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IN THE

Supreme Court of the United States

October Term, 1948

ASSOCIATED TELEPHONE AND TELEGRAPH COMPANY,
AUTOMATIC ELECTRIC COMPANY
and
AUTOMATIC ELECTRIC LABORATORIES, INC.,
Petitioners,

vs.

FEDERAL TELEPHONE AND RADIO CORPORATION,
Respondent.

REPLY BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PAUL KOLISCH,
Counsel for Respondent.

WALTER A. DARBY,
EDWARD D. PHINNEY,
Of Counsel.

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Petitioners are in effect asking this Court to decide whether or not the denial of a motion to dismiss was right. The intervention of this Court is prayed for in an interlocutory matter because, it is argued, if the complaint is not dismissed, the courts will be "inundated with declaratory judgment actions" during the years before the question could be brought to this Court after a final decree.[1]

Usually such attempt to take an appeal in an interlocutory matter is unavailing because otherwise the rule against such appeals would become meaningless. As far as delay is concerned, that has its origin in petitioners' reluctance to join issue. Besides, the decision below will not increase but decrease declaratory judgment actions, since it will cause owners of large groups of patents to refrain from

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[1] Petition, page 11 (Point 5), Brief, page 26.

rely [5] by denying the allegations of Section 5 as well as of Section 7 of the complaint.

The contention that petitioners do not know the nature of the Rochester and Lexington bids [6] and that they are unable to determine from the Exhibits attached to the complaint, what kind of devices respondent is manufacturing and offering for sale [7] does not mitigate petitioners' failure to deny the allegations of Section 7. Besides, this cannot be reconciled with petitioners' admission [8] that they were competitive bidders for at least one of respondent's orders. There was a corresponding admission by counsel for Automatic in the course of the argument before the Circuit Court of Appeals, as well as that petitioners were acquainted with telephone systems that respondent has installed abroad.[9]

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[5] Brief, pages 16-22.

[6] Petition, page 9.

[7] Petition, pages 5 and 6.

[8] Petition, page 9.

[9] The stenographic transcript records the following colloquy that took place in the course of the argument before the Circuit Court of Appeals between the Presiding Judge and counsel for Automatic (p. 60):

> "Judge Biggs: I don't quite get the significance of your argument with respect to this, Mr. Lindsey. Federal did sell equipment to Lexington and Rochester. They are actually in this market, aren't they?
>
> "Mr. Lindsey: Oh, they were in the market. They had received these orders for installation this year."

Then again on page 62:

> "Judge Biggs: Now, Mr. Lindsey, don't misunderstand me; I am in no sense doubting your word; I don't mean to imply it; but your company makes automatic equipment. Do you mean to tell me it does not know what sort of automatic equipment I. T. & T. were using, for example, in Switzerland?
>
> "Mr. Lindsey: Oh, yes, in Switzerland, yes. It may be Rotary here, or Federal may be putting in Strowger, I don't know."

(Federal is a subsidiary of I. T. & T.—International Telephone and Telegraph Corporation; Candy affidavit, paragraph 9, R. 13a; Caverley affidavit, paragraph 5, R. 16a.)

If any information is needed in addition to Exhibits 1 to 4 to determine whether there was "literal response in plaintiff's apparatus" to claims of the seven patents recited in the complaint, or of any other of petitioners' 1600 patents, this can be readily obtained under the Rules of Civil Procedure.

Conclusion.

There is no precedent on all fours with the facts of the case because, the notion becomes rather difficult to resist, the offensive advertisement was contrived to avoid all reported precedents and yet scare respondent's customers into dealing only with petitioners. The advertisement was a threat different from but graver than many which petitioners approvingly cite as having provoked justiciable controversies.

The spirit of the Declaratory Judgment Act and the language of the very decisions on which petitioners rely afford complete justification for the unanimous decision of the Circuit Court of Appeals for the Third Circuit that the threat contained in the advertisement started a justiciable controversy and that the complaint sustains respondent's jurisdictional burden.

The petition should be denied.

Respectfully submitted,

PAUL KOLISCH,
Counsel for Respondent.

WALTER A. DARBY,
EDWARD D. PHINNEY,
Of Counsel.

New York, September 29, 1948.